FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 484

J. RAY McDERMOTT & CO., INC.,
Petitioner,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. DICKERMAN WILLIAMS,
Counsel of Record for Petitioner,
76 Beaver Street,
New York 5, N. Y.

FARIS, LEAKE & EMMETT,
Whitney Building,
New Orleans 12, La.,
Counsel for Petitioner.

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Statutes Involved	3
Reasons for Granting the Writ	3
Conclusion	7
Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit	1a

Cases Cited

Broward County v. Wickman, 195 F. 2d 614	6
Department of Highways v. McWilliams, 1949 A. M. C. 2074 (W. D. La.)	6
Ex parte State of New York, 256 U. S. 490	3, 4, 5
Kelley Island Co. v. City of Cleveland, 47 F. Supp. 533 (N. D. Ohio)	6
O'Keefe v. Staples Coal Co., 201 F. 131 (D. Mass.)	6
Petty v. Tennessee-Missouri Bridge Commission, 359 U. S. 275	6

PAGE

Standard Oil Co. v. United States, 27 F. 2d 480 (S. D. Ala.) 6

State Road Department v. United States, 78 F. Supp. 278 (N. D. Fla.) 6

The Alex. Y. Hanna, 246 F. 157 (D. Del.) 6

Workman v. City of New York, 179 U. S. 552 ..... 3, 4

Other Authority Cited

American Maritime Cases, Aids and Obstructions to Navigation, Section 1151 6

Statutes Cited

28 U. S. C. 1254(1) 2

Revised Statutes of Louisiana, Sections 12 and 22 .. 3

IN THE

Supreme Court of the United States

October Term, 1959

No.

J. RAY MCDERMOTT & CO., INC.,

Petitioner,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 3, 1959.

Citations to Opinions Below

The opinion of the District Court is unreported. It is quoted in full in the opinion of the Court of Appeals (2a).

The opinion of the Court of Appeals is reported at 267 F. (2d) 317, and is printed as Appendix "A" hereto (1a-2a).

A motion for rehearing was denied July 20, 1959 (R. 40).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Does a United States court of admiralty have jurisdiction over the subject matter in a libel for negligence in navigable waters against the Department of Highways, State of Louisiana *in personam*.

Statement

J. Ray McDermott & Co., Inc., filed a libel in admiralty *in personam* in the United States District Court for the Eastern District of Louisiana against the Department of Highways, State of Louisiana. The libel sought recovery for damages to its Piledriver Barge No. 5 resulting from the negligent lowering of the Bourg Bridge on the barge (R. 2-6). The Department of Highways moved to dismiss the libel for lack of jurisdiction over the subject matter (R. 7-8).

Jurisdiction over the person was in no way challenged.

The motion to dismis was granted (R. 9-10). That decision was affirmed in the Court below (R. 18).

The challenge to the subject matter was based upon respondent's alleged immunity from liability for negligence (R. 7). Respondent at no time denied that the libel asserted a maritime wrong.

Under the local law of Louisiana respondent is not liable in tort (2a).

Statutes Involved

The powers and duties of the Department of Highways, State of Louisiana are defined in the Louisiana Revised Statutes of 1950, Sections 1 through 460. Of particular relevance are Sections 12 and 22 as follows:

Section 12:

> Domicile: Service of Process. The domicile of the Department of Highways is the city of Baton Rouge, parish of East Baton Rouge. Service of citation and other process directed to the department shall be made by handling the citation or other process to the director or to the chief engineer.

Section 22:

> Powers. The department has all of the rights, powers and immunities incident to corporations. It may acquire, own, administer, alienate, and otherwise dispose of all kinds of property, movable and immovable, tangible and intangible; contract; adopt, alter, or destroy an official seal; sue and be sued, implead, and be impleaded.

Reasons for Granting the Writ

The decision below departs from the principle laid down in *Workman* v. *City of New York*, 179 U. S. 552, subsequently elucidated and defined in *Ex parte State of New York*, 256 U. S. 490, and followed by the inferior federal courts for over fifty years.

That principle is this: a court of admiralty with jurisdiction over the *person* of a public body will exercise that jurisdiction in accordance with the substantive law of admiralty and without regard to immunities provided by local law.

In *Workman* the libelant had been injured by reason of the negligent operation of a fireboat owned by the City of

New York. Concededly the City was not liable under the local law of New York.

This Court denounced the proposition that "• • • state laws or decisions can deprive an individual of a right to recover for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that *admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed.*" 179 U. S. 563.

And at 179 U. S. 566 the Court distinguished cases in which jurisdiction had been refused by saying that their rationale

> "rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but *alone* on their inability to give redress in a case where jurisdiction over the *person* or property cannot be exercised."

This Court's opinion in *Workman* demonstrates the validity of these conclusions in an extended analysis of both English and American cases and in a vigorous exposition of the need for uniformity in admiralty recognized by the Constitution. It would be superfluous to repeat or even condense that opinion here.

In *Ex parte State of New York*, 256 U. S. 490, this Court held an admiralty court without jurisdiction over certain canal boats owned by the State of New York, libeled *in rem* because of alleged negligence. The Superintendent of Public Works, under whose direction the boats were operated, claimed them. No jurisdiction over the person of any state officer, corporation or other instrumentality was claimed. Libelant's argument was that the Eleventh Amendment, which specifies "at law or in equity," did not apply in admiralty. This Court said at pages 499-500

[the italics are those of this Court in *Ex Parte State of New York*]:

> "Much reliance is placed upon Workman v. New York City, 179 U. S. 552. But that dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant; and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case. Thus (p. 566): 'The contention is, although the corporation *had general capacity to stand in judgment;** and was therefore *subject to the process** of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law,' etc. 'But the maritime law affords no justification for this contention, and no example is found in such law, where one who is *subject to suit and amenable to process** is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon.' [That is, the theory of non-liability under local law.]
>
> We repeat, the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent, is clear."

Strangely enough, the Court below quotes the last paragraph as authority for denial of jurisdiction in this case.

But the *Workman* case and the language from *Workman* quoted in the first paragraph above make it abundantly clear that, *for purposes of admiralty, a state consents to suit according to the substantive principles of admiralty against one of its instrumentalities when the state legislature provides that the instrumentality may "sue and be sued" and is subject to the service of process.* The italics used by the Court leave no doubt of this.

---

* Italics those of the opinion of this Court in *Ex parte State of New York*.

Until the recent decision of the Court below in *Broward County* v. *Wickman*, 195 F. 2d 614, the distinction made in *Ex parte State of New York* was apparently followed uniformly by the inferior federal courts. In *O'Keefe* v. *Staples Coal Co.*, 201 F. 131 (D. Mass.), Bristol County, Massachusetts, was held liable in admiralty for the negligent operation of a drawbridge because it had capacity to "sue and be sued" despite an express exemption provided by a Massachusetts statute from liability for negligence. On the other hand, in *The Alex. Y. Hanna*, 246 F. 157 (D. Del.), jurisdiction over the Levy Court of New Castle County, Delaware, was denied because the Levy Court lacked such capacity. Although the results reached were different, both opinions have valuable discussions of *Workman* and other cases, and conclude that jurisdiction over the person enables a court of admiralty to enforce its own substantive law, so that in an admiralty case, the only question of jurisdiction is as to jurisdiction over the person.

Certainly there is an entire body of law with respect to drawbridge operation in which public corporations are often parties. Cf. Index, American Maritime Cases, Aids and Obstructions to Navigation, § 1151. This respondent invoked the jurisdiction of a court of admiralty, in at least one reported case, when it believed that one of its bridges had been damaged by the negligence of a passing tow. *Department of Highways* v. *McWilliams*, 1949 A. M. C. 2074 (W. D. La.).

Admiralty suits for negligence against public corporations are of course most numerous. Ordinarily the opinions in reported cases do not discuss the liability of the corporation under local law. Opinions which do mention the power of admiralty to apply its substantive rules against public bodies whenever it has jurisdiction over the person include *Kelley Island Co.* v. *City of Cleveland*, 47 F. Supp. 533, 540 (N. D. Ohio); *Standard Oil Co.* v. *United States*, 25 F. 2d 480, 485 (S. D. Ala.); *State Road Department* v. *United States*, 78 F. Supp. 278, 280 (N. D. Fla.).

The recent decision of this Court in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U. S. 275, is not in point, strictly speaking, as it concerned an action at law, although the tort was committed in navigable waters. The decision does show, however, the disfavor with which this Court regards claims of immunity from liability for negligence.

This Court has spoken so often and so emphatically of the need for uniformity in maritime law that we do not argue that subject. The unfortunate results which will flow from the present decision are vividly described in the *Workman* opinion. It would be, we submit, doubly unfortunate that those results should follow by retrogression from that memorable admiralty opinion of this Court in the present era of generally diminishing immunity from liability for tort.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit herein.

Respectfully submitted,

C. Dickerman Williams,
Counsel of Record for Petitioner,
76 Beaver Street,
New York 5, N. Y.

Faris, Leake & Emmett,
Whitney Building,
New Orleans 12, La.,
Counsel for Petitioner.

Appendix A

(Opinion of the United States Court of Appeals for the Fifth Circuit)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17668

J. RAY MCDERMOTT & CO., INC.,

Appellant,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 3, 1959.)

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: This appeal is in very narrow compass. It presents a single question, whether the Department of Highways of the State of Louisiana, which is a department of the state, can be made to stand in judgment in a tort action in admiralty arising out of the collision of libellant's barges with Bourg Bridge, located at the intersection of the old Intracoastal Water Way and Bayou Terrebonne Parish, Louisiana.

The matter comes up in this way. The Department of Highways moving to dismiss on the ground of its non-

suability as a department of the State of Louisiana, in a tort action, the district judge entered an order[1] granting the motion and dismissing the suit.

Appellant is here relying on *Workman* v. *Mayor, etc. of New York*, 179 U. S. 552, and insisting that in a suit in admiralty, as this one is, the claimed immunity from suit in tort may not be asserted.

Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and *Naomi Petty* v. *Tenn.-Mo. Bridge Comm.*, 255 F(2) 857, reversed (three judges dissenting) in *Petty* v. *Tenn.-Mo. Bridge Comm.*, — U. S. — (4-20-59), not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought, urges upon us that the judgment must be affirmed.

This court in a case involving a collision with a bridge in Broward County, Florida,[2] has settled it for this circuit, as the Supreme Court in Ex Parte, State of New York, 256 U. S. 490, has for the country as a whole, that "the immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear." On the authority of these cases and others of similar purport, the judgment is AFFIRMED.

---

[1] "This cause came on at a former date, to be heard on the motion of the defendant, Department of Highways, State of Louisiana, to dismiss the complaint herein, and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

"Now, on due consideration thereof;

IT IS ORDERED by the Court that the motion of defendant, Department of Highways, State of Louisiana, to dismiss the complaint herein, be, and the same is hereby, GRANTED.

AUTHORITIES

"The Department of Highways may not be sued *in tort* without the consent of the State of Louisiana. Westwego Canal & Terminal Co. v. La. Highway Com., 9 So(2) 389; Kilberg v. La. Highway Com., 8 La. App. 441; Orgeron v. La. Highway Com., 140 S. 282."

[2] Broward County, Florida v. Wickman, 195 F(2) 614.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 23 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 484

J. RAY McDERMOTT & CO., INC.,

Petitioner,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

NORMAN L. SISSON,
Counsel of Record for Respondent,
280 Highway Headquarters Bldg.,
Baton Rouge 4, Louisiana.

D. ROSS BANISTER,
PHILIP K. JONES,
GEORGE W. LESTER,
NORMAN L. SISSON,
280 Highway Headquarters Bldg.,
Baton Rouge 4, Louisiana,
Counsel for Respondent.

Montgomery & Co., "The Brief Specialists", 430 Charter St., N. O., La.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 484

J. RAY McDERMOTT & CO., INC.,

Petitioner,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondent prays that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 3, 1959.

QUESTION PRESENTED.

Does a United States Court of Admiralty have jurisdiction over the subject matter in a libel for negligence

in navigable waters against the Department of Highways of the State of Louisiana in *personam*, when the State has not given its consent to the filing of such libel?

STATEMENT.

J. Ray McDermott & Co., Inc., filed a libel in admiralty in the United States District Court for the Eastern District of Louisiana, against the Department of Highways of the State of Louisiana, seeking recovery of damages to its piledriver barge by the Bourg Bridge, **without having first obtained permission from the State of Louisiana so to do.** (R. p. 7.)

THE DEPARTMENT OF HIGHWAYS IS A GOVERNMENTAL AGENCY OF THE STATE.

A "state" is a body politic, which must, of necessity, carry on its various functions through agencies or departments created by the Legislature under the provisions of the Constitution, each of which agency or department is an integral part of the State, and the aggregate of all these agencies or departments is a part or portion of the whole.

The Department of Highways of the State of Louisiana is merely a department or agency of the State, created under the Constitution and statutes of the State, for the sole purpose of constructing, improving and maintaining the public roads and bridges of the State, which is a governmental function.

"The construction and maintenance of public roads and bridges are governmental functions.

"A state may perform governmental functions of constructing and maintaining public roads and bridges in its own name or through its public officers or governmental agency."

Kansas City Bridge Company v. Alabama State Bridge Corporation, 59 F. (2d) 43;
Keggin v. Hillsborough County, 71 So. 372 (Cited in *Broward County v. Wickman, infra).*

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Amendment XI of the United States Constitution reads as follows:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

* * * * * *

"A suit against a state by one of its own citizens, the state not having consented to be sued, is unknown and forbidden by the law, as much so as suits against a state by citizens of another state of the Union or by citizens or subjects of foreign states."

Fitz v. McGhee, 172 U. S. 524, 43 L. Ed. 535;
Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, 50 L. Ed. 477;

Riley v. Worcester County Trust Co., 89 F. (2d) 59;

Georgia R. R. & Banking Co. v. Redwine, 72 S. Ct. 321, 342 U. S. 299, 96 L. Ed. 335;

Ford Motor Company v. Department of Treasury of State of Indiana, 65 S. Ct. 347, 323 U. S. 459, 89 L. Ed. 389.

SOVEREIGN IMMUNITY OF STATE EXTENDS TO SUITS IN ADMIRALTY.

"That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification . . .

"Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule. It is true the amendment speaks only of suits in law or equity; but this is because, as was pointed out in Hans v. Louisiana, 134 U. S. 1, 10-17, 10 Sup. Ct. 504, 33 L. Ed. 842, the amendment was the outcome of a purpose to set aside the effect of the

decision of this court in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, which happened to be a suit brought against the state by a citizen of another state, the decision turning upon the construction of that clause of Section 2 of Article 3 of the Constitution establishing the judicial power in cases in law and equity between a state and citizens of another state, from which it naturally came to pass that the language of the amendment was particularly phrased so as to reverse the construction adopted in that case.

"In Hans v. Louisiana, supra, the court demonstrated the impropriety of construing the amendment so as to leave it open for citizens to sue their own state in the federal courts; and it seems to us equally clear that it can not with propriety be construed to leave open suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not."

In Re: State of New York, et al., 256 U. S. 490, 41 S. Ct. 588-90, 65 L. Ed. 1057;

Broward County, Fla., v. Wickman, U. S. Court of Appeals, Fifth Circuit, 195 F. (2d) 614.

"The State of Michigan, operating ferries through its Highway Department, may claim sovereign immunity when sued in admiralty for collision damage."

Copper S. S. Co. v. Michigan, 194 F. (2d) 465;

Schlmeyer v. Romero Co., 117 F. (2d) 996.

In suit of Westwego Canal & Terminal Company, Inc., v. Louisiana Highway Commission, in an opinion rendered June 29, 1942, reported in 9 So. (2d) 389, the Supreme Court of the State of Louisiana stated in part:

> "It has been held, and now appears to be well settled, that the provisions in Act 95 of 1921, Extra Session, (amended by Act 4 of 1942 and shown as Louisiana Revised Statutes of 1950, Title 48, Section 22), whereby the Highway Commission is declared to be a body corporate and that as such it may sue and be sued, does not authorize suits against the Commission for the recovery of damages **ex delicto.** Kilberg v. Louisiana Highway Commission, 19 La. App. 628, 140 So. 282, in which writs of certiorari and review were refused by this Court."

Chief Judge Hutcheson of the United States Court of Appeal, Fifth Circuit, who wrote the opinion in this case, when it was before that Court, as reported in 267 F. (2d) 317, stated in part as follows:

> "This court, in a case involving a collision with a bridge in Broward County, Florida (Broward County Florida v. Wickman, 4 Cir., 195 F. (2d) 614) has settled it for this circuit, as the Supreme Court in Ex parte State of New York, 256 U. S. 490, 41 S. Ct. 588, 65 L. Ed. 1057, has for the country as a whole, that 'the immunity of a state from a suit in personam in the admiralty, brought by a private person without consent, is clear. On the authority of these cases, and others of similar purport, the judgment is affirmed."

Respondent respectfully submits that the judgment of the United States Court of Appeal for the Fifth Circuit should be sustained and the application of petitioner, J. Ray McDermott & Co., Inc., for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN L. SISSON,
Counsel of Record for Respondent,
280 Highway Headquarters Bldg.,
Baton Rouge 4, Louisiana.

D. ROSS BANISTER,
PHILIP K. JONES,
GEORGE W. LESTER,
NORMAN L. SISSON,
280 Highway Headquarters Bldg.,
Baton Rouge 4, Louisiana,
Counsel for Respondent.

CERTIFICATE.

I hereby certify that copies of the foregoing brief have been served on opposing counsel by placing same in the United States mail, postage prepaid, addressed to their offices.

Baton Rouge, Louisiana, this day of November, 1959.

NORMAN L. SISSON,
Counsel of Record for Respondent.